IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 372 of 1989

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

GOVINDBHAI ATMARAM PATEL

Appearance:

1. Criminal Appeal No. 372 of 1989

MR IM PANDYA, AP for Appellant

MR PN GOHIL FOR ND GOHIL for Respondent Nos. 1-2

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 14/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

This appeal has been filed by the State against the judgment and order of acquittal dated 10-3-1989 rendered by the learned Addl. City Sessions Judge, Court No.8, Ahmedabad, in Sessions Case No.227 of 1988 whereby the respondent-accused No.1 was acquitted of the offences charged against him under Sec.21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the Act' for short) and also under Sec.66(1)(b) of the Bombay Prohibition Act while the respondent-accused No.2 was acquitted for the offence charged against him under Sec.29 of the Act.

2. The short facts are that on 7-2-1988, PSI, Mr.N.N.Pathan, who was on duty at Shahibaug Police Station, Ahmedabad, received one secret information at 12.30 noon that in Haripura Village, one Govind Atmaram Patel is carrying on the business of selling brown sugar on the ota of his house and, therefore, he along with another PSI, Mr.Barochia and other police personnel left the police station for Haripura Village. When they came near the house of Govind Atmaram Patel, they stopped their vehicle at a short distance from the house of Govind Atmaram Patel keeping a vigil. After 2-3 minutes, one person came near Govind Atmaram Patel. At that time, they came near Govind Atmaram Patel and caught hold both of them. Thereafter, said Govind Atmaram was interrogated. When he was offered search of the raiding party, same was refused. Hence, said person was searched and from the right side of his pants' pocket, one case of kings wills cigarette yellow in colour was found. On opening the same, one half burnt cigarette and one paper packet were found and on opening the paper packet, white colour powder was found. As said powder was smelt by the raiding party to be of brown sugar, it was weighed and found to be weighing 1.5 gms. Currency notes amounting to Rs.1008/- were also found from his pocket. All these things were sealed after following proper procedure in presence of panchas and other police personnel. Thereafter, the raiding party took Govind Atmaram to his house along with panchas. During the search on the second floor of his house, clothes of Govind Atmaram were seen hanging on the peg. Another bag was also found hanging from which one empty tin of oil with small balance, small spoon, 11 small weights, one plastic bottle with lid and one polythene bag containing small polythene bags were also found. Electric bill in the name of Atmaram Jagjivandas bearing consumer No.29049 was also found from said bag on which both the panchas have put their signatures. However, on the search of person who was talking to Govind Atmaram i.e. accused No.2,

nothing was found. Thereafter, both the accused along with the muddamal were brought to the Shahibaug Police Station where complaint was lodged against them and same were handed over by PSI, Mr.Pathan, with his report to PSO, Shahibaug Police Station, and offence was registered there as Shahibaug Police Station Crime Register No.49 of 1988. Thereafter, investigation was handed over to PSI, Pathan. On completion of investigation, charge-sheet was submitted against both the accused in Court. Charge was framed against the accused. The accused have denied to the said charge and prayed for trial. To prove the guilt against the accused, prosecution examined various witnesses and thereafter submitted the closing purshis. As the prosecution did not examine two witnesses namely, Balvantsing Sambubha Zala and the person alleged to have weighed the muddamal namely, Surajmal Nenmal Chokshi, accused gave an application to examine them as court witnesses. Said application was allowed and both these witnesses were examined as court witnesses. After recording the further statement of the accused under Sec.313, Cr.P.C. and after hearing the learned advocates appearing for the respective, the respondents-accused were acquitted by the learned Addl. City Sessions Judge, Ahmedabad, of the charges framed against them which is giving rise to prefer this criminal appeal.

3. Heard learned APP for the State, Mr.I.M.Pandya and Mr.P.N.Gohil for Mr.N.D.Gohil, learned counsel for the respondents-accused.

4. Mr.Pandya has taken us through the reasoned judgment together with oral as well as documentary evidence. He has also read the evidence of PSIs, Mr.Pathan and Mr.Barochia, complaint and search and seizure panchnama. He has also taken us through the evidence of FSL expert, Ashok Patel. It is argued by him that while conducting search and seizure, all the formalities as required under the Act have been followed by the prosecution and they were able to prove beyond reasonable doubt that the muddamal in question seized from the accused No.1 and his house in presence of panchas and handed over to PSO, Shahibaug Police Station with the accused were the same. On reading the evidence of Police Constable, Mr.Becharsingh Chavda, P.W.No.3, Ex.19, it is submitted that what have been handed over to him by the crime writer head on 15-2-1988 have been handed over to FSL on the same day. In this regard, he has taken us through the evidence of FSL people together with the documentary evidence and argued that muddamal in question seized from the accused No.1 reached the FSL authorities in tact condition. Taking us through Ex.14

along with the covering letter Ex.15, it is argued that the muddamal recovered and seized from the accused No.1 and analyzed by the FSL people was brown sugar and hence, court below ought to have convicted the accused for the charges framed against them. However, Mr.Pandya has fairly admitted that as far as respondent-accused No.2 is concerned, nothing has been recovered from him.

5. Mr.Gohil, learned counsel for the respondents-accused, has mainly argued that while conducting search and seizure, since the relevant mandatory provisions of the Act were not followed by the prosecution, court below has rightly acquitted the accused considering all the aspects of the matter. In this connection, he has taken us through the complaint, search and seizure panchnama and evidence of both the PSIs and argued that there are material contradictions in their evidence deposing contrary to the panchnama and FIR. He has also taken us through the relevant discussion made by the learned Addl. City Sessions Judge in this regard in order to show that the prosecution has not followed relevant provisions of the Act at the time of search and seizure. The muddamal allegedly weighed by Surajmal Nenmal Chokshi and Mr.Balvantsing S.Zala, Head Constable, who has been brought to the scene of offence, have been dropped by the prosecution from examining and, therefore, on an application being given by the accused, they were examined as court witnesses. Drawing our attention towards their evidence, it is argued by Mr.Gohil that there are material contradictions in them. Drawing our attention towards the evidence of PSI, Mr.Pathan, it is established that the alleged muddamal have not been seized and weighed as stated by the prosecution. If the say of Balvantsing is to be believed, then it can be seen that it has been taken by one of the Constables at the shop of Surajmal and weighed there. This shows that prosecution has no regard towards the truth. If prosecution can go to this extent, then a presumption can be drawn in favour of the accused. Showing the complaint, search and seizure panchnama, evidence of both the PSIs and panchas, it is argued that all have deposed in their respective evidence that the muddamal alleged to have been seized from the custody of the accused was white in colour. Showing the evidence of FSL Inspector, Shri Ashok Natvarlal Patel, P.W.No.1, Ex.9, it is argued that this witness has categorically deposed that muddamal which he has analyzed was slightly brown in colour. Hence, according to Mr.Gohil, the muddamal which has been analysed by the FSL is not the same muddamal which has been alleged to have been recovered from the accused. It is further argued that

though prior secret information was received by PSI, Mr.Pathan, he has admitted in his cross-examination that said information was not reduced in writing. PSI, Mr.Pathan, has also not informed the accused regarding their valuable rights of conducting the search and seizure in presence of a Magistrate or a Gazetted Officer. Moreover, the mandatory provision of informing about the search, seizure and arrest of the accused to his Superior Officer within 48 hours of the incident has not been followed by Mr.Pathan. According to him, Mr.Pathan has not reported about the incident to his Superior Officer within 48 hours or even thereafter. All these go to show that breach of mandatory provisions has been committed by PSI, Mr.Pathan, which is affecting prejudicial to the rights of the accused. Therefore, court below has rightly acquitted the accused and since judgment and order of acquittal is just and proper, same may not be interfered with in this appeal.

6. We have gone through the impugned judgment, complaint, search and seizure panchnama, evidence of both the PSIs, Constables, Panchas, FSL Expert-Ashokbhai Natvarlal Patel and evidence of Balvantsing and Surajmal Nenmal Chokshi. It is clear that the court below has minutely considered the evidence of all the witnesses which reflects from para 12 onwards wherein he has discussed the evidence of PSI, Mr.Barochia, at length and come to the conclusion that there are material contradictions in their evidence giving contrary versions in the complaint and the panchnama wherein PSI, Mr.Pathan, himself is the complainant. After elaborate discussion, court below has rightly come to the conclusion that there are breach of various provisions of the Act which were otherwise required to have been followed by the prosecution and we are in agreement with the said finding arrived at by the court below. It is to be noted that PSI, Mr.Pathan who has received secret information has not reduced the same in writing. Similarly, before conducting search and seizure, the accused were not informed of their valuable rights regarding their search and seizure in presence of a Magistrate or a Gazetted Officer. Besides, after search and seizure and arrest of the accused, PSI, Mr.Pathan, has not informed his superior officer within 48 hours or thereafter. It is clear from the aforesaid that relevant mandatory provisions of the Act were not followed by the prosecution. There are material contradictions about the colour of the material alleged to have been seized from the accused No.1 which also creates doubt in the mind of the court below as well as this Court. Over and above, there are also material contradictions regarding the

alleged recovery of the muddamal from the person of the accused No.1 and which also reflects from the oral as well as documentary evidence i.e. FIR and panchnama. Merely because the accused No.2 was found talking to the accused No.1 standing very nearby, he cannot be involved in the crime in question from whom admittedly nothing was found. It is also not the case of the prosecution that while dealing with the narcotic drugs, he was one of the persons who was actively involved in the crime. From the aforesaid, it is clearly established that it is a clear-cut case of breach of mandatory provisions of the Act which ultimately resulted into acquittal of the accused and therefore court below has rightly held that prosecution has failed to bring home the guilt against the accused. Since no illegality or irregularity has been committed by the learned Judge, the impugned judgment and order of acquittal does not deserve any interference. In view of the aforesaid, this appeal is required to be dismissed.

7. The appeal is dismissed.

(R.P.DHOLAKIA,J.)

(SHARAD D.DAVE,J.)

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